

Memorandum

To : Stephen R. Rudd
Administrator, Environmental Fees Division
MIC:57

Date: November 4, 1996

From : M. Judith Nelson *M. Nelson*
Tax Counsel
MIC:82

Subject:

Ref: Legal Request #96-04

Introduction and Conclusion. This is in response to your request for a legal opinion on whether the hazardous fee exemption set forth in Health and Safety Code Section 25174.7 (the "Exemption") applies to a particular situation in which a Redevelopment Agency contracts for the clean-up of a site on which a limited partnership will build low income housing.

For the reasons set forth below, I conclude that the Redevelopment Agency of the _____ and its contractor, the _____, qualify for the Exemption.

Background.

The Agency. The Redevelopment Agency of the _____ (the "Agency") is established pursuant to the California Community Redevelopment Law (Health and Safety Code Sections 33000 et seq.) and as such constitutes a government agency.

Construction of Affordable Housing. In November 1994, the Agency adopted Resolution 251-94 authorizing the execution of an agreement for disposition of land for private development with the Housing Development and Neighborhood Preservation Corporation, a California Nonprofit corporation, (the "Developer") for the development of affordable housing located at _____ in the South of Market Earthquake Recovery Redevelopment Project Area (the "Development Site"). In December 1994, the Agency transferred title to the Development Site to a limited partnership called _____, a California Limited Partnership. The Developer is the general partner of _____ would be responsible for constructing 29 very low and low income housing units on the Development Site. The documents submitted by the Developer with its exemption

request indicate, further, that [redacted] authorized Developer to contract to remove, treat and dispose of soils containing hazardous materials located on the Development Site.

The Contamination at the Development Site. It is my understanding that the contamination of the Development Site occurred over several land uses prior to the most recent use. The contamination includes lead based paint, and hazardous waste deposits by heavy industry, smelters and tanning operations. The entire south of Market area is contaminated in part because it is built up with bay fill material. In other words, the contamination was caused by a person other than the Agency.

The Contract Between Agency and Developer. In September, 1995, the Agency and Developer entered into a Regulatory and Grant Agreement (the "Agreement") pursuant to which Agency would advance \$250,000 to Developer to cover the direct and indirect costs of removal, treatment, disposal and handling of soils containing hazardous materials on the Development Site. Among the terms of the Agreement were the following:

1. The Agency would deposit the \$250,000 grant amount into a joint bank account established by the Developer with the Agency as a cosigner, and Agency reserves the right to withdraw the funds from the joint account upon certain occurrences.
2. The Agency reviews and approves disbursement requests submitted by the Developer.
3. The Developer must maintain records that accurately and fully show the date, amount, purpose and payee of all expenditures from the grant amount.
4. The Developer must name the Agency as an additional insured on all insurance policies in connection with the Development Project.
5. The Developer must be authorized to execute the Agreement.
6. The Developer must provide to the Agency executed copies of all contracts in connection with the removal, treatment, transportation, disposal and handling of the hazardous materials resulting from removal and treatment of contaminated soils at the Development Site.

Section 25174.7 Exemption. Health and Safety Code Section 25174.7(a) provides in pertinent part as follows:

- (a) The fees provided for in sections 25174.1 [disposal fee] and 25205.5 [generator site fee] do not apply to any of the following;
- (1) Hazardous wastes which result when a government agency, or its contractor, removes or remedies a release of hazardous waste in the state caused by another person...

Discussion. Under the Exemption, it does not matter who the generator is, or who owns the property on which the contaminated soil is located. The Exemption simply says that certain fees

Stephen R. Rudd
November 4, 1996
Page 3

do not apply to hazardous wastes which result when a government agency, or its contractor removes or remedies a situation caused by another person

In this case, the Agency, which did not cause the contamination, contracted with the Developer to remove the contaminated soil from the Development Site. The fact that
is listed as the generator on the manifest and holds title to the contaminated property is irrelevant to application of the Exemption. That is because there is no requirement under the Exemption to identify the generator or property owner in order to qualify for the Exemption.

Conclusion. Under the facts presented for review, I conclude that the hazardous wastes which resulted from the removal of contaminated soil from the Development Site are exempt from generator fees pursuant to the Exemption. If you have any questions, please call me at 324-2641.

MJN:es

cc: Mr. Dennis Mahoney, DTSC
Ms. Tammi Uchida
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